Frontier Corporation

frontier

180 South Clinton
Rochester, NY 14646

February 16, 1994

BY OVERNIGHT MAIL

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: RM-8577

Dear Mr. Caton:

Enclosed for filing please find an original plus nine (9) copies of the Comments of Frontier Cellular Holding Inc. in the above-docketed proceeding.

To acknowledge receipt, please affix an appropriate notation to the copy of this letter provided herewith for that purpose and return same to the undersigned in the enclosed, self-addressed envelope.

Very truly yours,

Michael J. Shortley, III

cc: International Transcription Service

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's	)	**RM-8577**
Rules To Preempt State and Local	)	
Regulation of Tower Siting for	)	
Commercial Mobile Radio Services	)	

COMMENTS OF FRONTIER CELLULAR HOLDING INC.

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February 16, 1995

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Summary

Frontier Cellular[1] submits these comments in support of the petition for rulemaking filed by the Cellular Telecommunications Industry Association seeking preemption of state and local zoning and similar regulation that has the effect of delaying or impeding the provision of commercial mobile radio services. Frontier Cellular has first-hand experience with the cost and delay associated with the local zoning process and has seen that process manipulated to frustrate the placement of towers and other structures that are absolutely essential to the provision of high-quality cellular service. The time is ripe for the Commission to exercise its preemption authority to preclude state and local governments from frustrating the Commission's valid policy objectives.

First, the Commission possesses clear authority to preempt state and local regulation that has the purpose or effect of frustrating important federal policies. The Commission's preemption authority in this matter derives from two independent sources -- section 2(b) of the Communications Act and section 332 of the Communications Act.

Second, state and local tower siting regulation represents a clear danger to fulfillment of the Commission's policy objectives. Frontier Cellular has experienced, numerous times, actions by zoning authorities that frustrate its ability to place towers and other structures that are essential to its provision of cellular service. Such actions have

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[1] The abbreviations used herein are defined in the text.

clearly impeded Frontier Cellular's ability to offer service and have significantly increased the costs thereof. In these circumstances, preemption is clearly warranted.

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COMMENTS OF FRONTIER CELLULAR HOLDING INC.

Introduction

Frontier Cellular Holding Inc. ("Frontier Cellular") submits these comments in support of the petition for rulemaking filed by the Cellular Telecommunications Industry Association seeking preemption of state and local zoning and similar regulation that has the effect of delaying or impeding the provision of commercial mobile radio services.[1] Frontier Cellular manages several wireline cellular markets in upstate New York on behalf of Upstate Cellular Network, a joint venture ultimately owned fifty percent each by Frontier Corporation and NYNEX Corporation.[2] As such, Frontier Cellular has first-hand experience with the cost and delay associated with the local zoning process and has seen that process manipulated to frustrate the placement of towers and other structures that are absolutely

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1 *Amendment of the Commission's Rules To Preempt State and Local Regulation of Tower Siting for Commercial Mobile Services Providers*, RM-8577, Cellular Telecommunications Industry Association's Petition for Rule Making (Dec. 22, 1994).

2 These markets are the Buffalo, Rochester, Syracuse and Utica-Rome Metropolitan Statistical Areas and New York Rural Service Area 1. Frontier Cellular itself, or through affiliates, possesses interests in several other New York cellular properties and in cellular properties in Alabama, Illinois and Georgia.

essential to the provision of high-quality cellular service. The time is ripe for the Commission to exercise its preemption authority to preclude state and local governments from frustrating the Commission's mandate to "make available, so far as possible, to all the people of the United States a rapid, efficient . . . wire and radio communications service."[3]

First, the Commission possesses clear authority to preempt state and local regulation that has the purpose or effect of frustrating important federal policies. The Commission's preemption authority in this matter derives from two independent sources -- section 2(b) of the Communications Act and section 332 of the Communications Act.

Second, state and local tower siting regulation represents a clear danger to fulfillment of the Commission's policy objectives. Frontier Cellular has experienced, numerous times, actions by zoning authorities that frustrate its ability to place towers and other structures that are essential to its provision of cellular service. Such actions have clearly impeded Frontier Cellular's ability to offer service and have significantly increased the costs thereof. In these circumstances, preemption is clearly warranted.

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[3] 47 U.S.C. § 151.

Argument

I. THE COMMISSION POSSESSES THE AUTHORITY TO PREEMPT STATE AND LOCAL TOWER SITING REGULATION.

Under sections 2(b) and 332 of the Communications Act, the Commission may preempt state and local action that has the effect of frustrating valid federal policy objectives. These independent sources provide the Commission with the requisite authority to preempt state and local tower siting regulation.

A. Section 2(b) of the Communications Act Provides the Necessary Preemption Authority.

Section 2(b) of the Communications Act[4] contains a general reservation of state authority over intrastate communications services. Nonetheless, section 2(b) has long been held to authorize the Commission to preempt inconsistent state regulation. In *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), the Supreme Court confirmed the Commission's authority to preempt such state regulation. Although the Court rejected the Commission's attempt to preempt state regulation of depreciation rate schedules, it did so because carriers could maintain two sets of books and, therefore, state depreciation regulation could not frustrate valid federal policy objectives. The Supreme Court, however, recognized that preemption would be warranted in those cases where the intrastate and interstate aspects of communications services were not separable.[5]

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[4] 47 U.S.C. § 152(b).

[5] 476 U.S. at 375.

Consistent with *Louisiana Pub. Serv. Comm'n,* the appellate courts have sustained the Commission's preemption of state regulations that would have had the effect of frustrating valid federal policy objectives.[6] In each of these cases, the courts upheld the Commission's preemption of state regulation, because such regulation would have thwarted the exercise of the Commission's legitimate authority over interstate communications.

The same rationale applies here. State regulations that delay, prevent or impose unnecessary costs upon the siting of towers necessary to provide cellular service directly frustrate the provision of interstate telecommunications services. Such regulations also directly impinge upon the Commission's valid policy objectives favoring the rapid, competitive deployment of wireless services.[7] The Commission possesses authority under section 2(b) of the Communications Act to preempt state and local tower siting regulation.

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6 *See, e.g., North Carolina Util. Comm'n v. FCC*, 552 F.2d 1036 (4th Cir. 1976), *cert. denied*, 434 U.S. 874 (1977) (preemptive deregulation of customer premises equipment upheld); *Pub. Util. Comm'n of Texas v. FCC*, 886 F.2d 1325 (D.C. Cir. 1989) (preemption of state regulation that frustrated the right of subscribers to interconnect with the public switched network upheld); *Pub. Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990) (preemption of state regulation of rates charged to interexchange carriers by local exchange carriers for disconnection of local service for nonpayment for long distance services upheld); *California v. FCC*, No. 92-70083, slip op. (9th Cir. Oct. 18, 1994) (limited preemption of state regulation governing the provision of enhanced services upheld); *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104 (D.C. Cir. 1989) (preemption of state regulation of marketing of customer premises equipment upheld).

7 *See, e.g., Regulatory Treatment of Mobile Services*, GN Dkt. 93-252, Second Report and Order, 9 FCC Rcd. 1411, 1419-23, ¶¶ 18-29 (1994).

B. Section 332 of the Communications Act Independently Supplies the Requisite Preemption Authority.

In amending section 332 of the Communications Act in the Omnibus Budget Reconciliation Act of 1993, Congress specifically preempted state rate and entry regulation of commercial mobile radio services. Congress did, however, reserve to the states jurisdiction over "other terms and conditions" of the intrastate provision of commercial mobile radio services.[8] This reservation of authority, however, is narrow. Section 332 of the Communications Act requires the Commission, in regulating commercial mobile radio services, to consider a number of policy objectives, including whether such regulation will: (1) "improve the efficiency of spectrum use;" and (2) "encourage competition and provide service to the largest feasible number of users."[9] States and localities are without authority to frustrate these national policy objectives. State and local tower siting regulations that prevent, delay or impose excessive costs upon commercial mobile radio services providers have precisely this effect.

In analogous areas, the Commission has exercised its authority to preempt state zoning and other land use regulations. For example, the Commission's policy statement in promulgating section 25.104 of the Commission's rules[10] preempts unreasonable state regulation of the placement of earth stations. Under section 25.104, states are limited in

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8 47 U.S.C. § 332 (c)(3)(A).

9 47 U.S.C. § 332 (a)(2), (3).

10 47 C.F.R. § 25.104.

their ability to enact regulations which discriminate between receive-only earth stations and other types of stations, except upon clear justification and preempts the regulation of receive-transmit earth stations in the same manner.[11] The Commission's designed its preemption policy in this case to prohibit states from "artificially favor[ing] one particular communications service over another."[12] The Commission should take the same action in this context.[13]

The Commission, therefore, possesses the requisite authority to preempt state and local tower siting regulations that have the effect of thwarting valid federal policy objectives.

II. THE COMMISSION POSSESSES AMPLE JUSTIFICATION TO PREEMPT STATE AND LOCAL TOWER SITING REGULATION.

At a minimum, state and local tower siting regulation is a time-consuming and expensive process. In addition, such regulation prevents or impedes the placement of towers necessary for carriers to offer high-quality wireless services. For example, Frontier Cellular annually spends hundreds of thousands of dollars on land use matters and it typically takes months, if not years, to process zoning and related applications. This has

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11 *See Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations*, CC Dkt. 85-87, Report and Order (Feb. 5, 1986).

The Commission has also taken similar action to limit state and local authority governing the placement of amateur radio towers. *See Federal Preemption of State and Local Regulation Pertaining to Amateur Radio Facilities*, PRB-1, 101 FCC 2d 952 (1985).

12 *Id.*, ¶ 25.

13 Thus, federal preemption of tower siting regulation should espouse such technology-neutral principles. The Commission should declare that state and local authorities may not utilize zoning or other land use regulations to discriminate against wireless services.

occurred *despite* clear New York case law that limits the ability of zoning and other bodies to restrict facilities placements by public utilities, including cellular carriers.

Moreover, in several instances, the political pressures upon local authorities have caused them to delay or deny, without any valid basis, Frontier's requests to site towers. A few examples will illustrate the concern.

1. Town of Ellicott, Chautauqua County (Jamestown) 1990-1992. This site took over five months to get approved. When it did, a number of neighbors sued, claiming -- without support or foundation -- loss of property value and inconsistency with the neighborhood, notwithstanding the existence of a nearby 500-foot tower which predated all of these houses in the neighborhood. In this case, there is no transfer to record because:

   a. the zoning board clerk claimed that she had forgotten to put batteries in the tape recorder for all the hearings; and

   b. prior to the principal public hearing, someone "inadvertently" sent away the court reporter that Frontier had arranged to be at the hearing and transcribe the meeting. Frontier was successful in the lower court and also on appeal to the Appellate Division; however, the entire matter took over a year and cost in excess of $75,000 in legal fees.

2. Town of Webster, Monroe County 1991-1992. This proceeding involved a free-standing tower for which the proposed height was lowered from over 200 feet to 190 feet and the proposed location was moved from one site in the town to another. In the course of over a year, in excess of 14 public meetings at the town board, the planning board and the zoning board were held. The neighbors in each case, without any support

or foundation, claimed that the tower would have adverse effects on health, migratory birds, property values, and character of the neighborhood -- notwithstanding the fact that the first proposed site was located at the town's sewer treatment plant and the second (and successful) site was located at the town highway department. Again, the process took well in excess of a year and cost in excess of $70,000. Although there was no proceeding in court challenging the underlying zoning approvals, Frontier needed to seek judicial intervention, because of a permissive referendum attempted by a handful of people.

3. Town of Ogden, Monroe County (Spencerport) 1994. In this case, Frontier filed an application in February 1994, had the public hearing in March and received preliminary approval from the town planning board in April, subject only to four minor conditions. Between the approval and the next public meeting two weeks later, a handful of neighbors were able to convince one faction of a major political party in the town to pressure the planning board to reverse its decision. The planning board did so at its public meeting in May and abruptly denied the application (after having given substantive approval the month before). Because of the egregious facts in this case, Frontier was able to obtain an injunction preventing the town from prohibiting the construction of the cell site. Nonetheless, the cost was in excess of $65,000 in legal fees.

4. Town of Mendon, Monroe County 1993 to present. Frontier filed three alternative site applications with the town to place a 150-foot monopole. The town initiated an environmental impact statement process under the State Environmental Quality Review Act. Since 1993, legal fees have exceeded $100,000 on this cell site. In addition to the

three proposed sites, Frontier investigated, at the town's request, dozens of alternative sites. Frontier fully expects litigation to ensue, regardless of whether the authorities approve or deny any of the applications. Again, opponents have raised, without factual support, issues regarding property values, health, structural safety and, contrary to all logic, lightning hazards (notwithstanding the fact that these towers, properly grounded, act as extremely effective lightning rods).

5. Town of Sullivan, Madison County (Chittenango) 1994 to date. This proceeding involves a 180-foot guyed tower. This process has been going on almost a year. Again, in this case, the town required an environmental impact statement, even though there were no real issues to investigate and spurious claims of health and safety concerns have been raised. Recently, as the environmental process is drawing to a close, a number of neighbors have raised issues concerning albino deer and great horned owls. This follows closely on the heels of another claim regarding the effect of the tower on carp and snow geese. Again, there has been absolutely no foundation or factual support for these assertions; however, the town planning board has allowed the process to continue. The authorities have held numerous public hearings and Frontier has again investigated many alternative sites. To date, legal fees have exceeded $40,000 and litigation is expected whether the site is approved or denied.

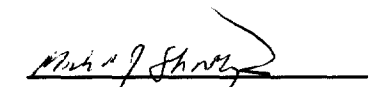
As these examples illustrate, state and local land use regulation may be, and routinely is, used to impede Frontier's ability to provide cellular service.

In asking the Commission to preempt state and local tower siting regulation, Frontier Cellular is not suggesting that the Commission become the national zoning board for commercial mobile radio services facilities. As the Commission did with respect to earth stations and amateur radio towers, the Commission may make clear that state and local land use regulation must be the minimum necessary to address valid local health and safety concerns, may not unreasonably impede the siting of towers and other structures, must be technology-neutral and may not frustrate the federal objective of the rapid deployment of cellular and other commercial mobile radio services. Ample precedent exists for the Commission to exercise its preemption authority, and it should do so in this case.

Conclusion

For the foregoing reasons, the Commission should grant the petition.

Respectfully submitted,



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February 16, 1995

Certificate of Service

I hereby certify that, on this 16th day of February, 1995, copies of the foregoing Comments of Frontier Cellular Holding Inc. were served by first-class mail, postage prepaid, upon:

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